NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

M & M Automotive Group, Inc., d/b/a Broadway Volkswagen *and* East Bay Automotive Council, Consisting of Machinists, Automotive Trades District Lodge 190, Local Lodge 1546, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters Local 78, International Brotherhood of Teamsters, AFL–CIO. Case 32–CA–17424

September 24, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, WALSH, AND MEISBURG

On April 18, 2000, Administrative Law Judge Thomas Michael Patton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

I. ISSUES

The issues raised on exception are whether the judge erred by finding that: (1) the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally granting wage increases and promotions to employees Fernando Arcos, Pedro Ramos, Charlie O'Neil, and Damien Ferrara is time barred by Section 10(b) of the Act; (2) the Respondent was privileged to unilaterally grant employee Jason Espinal a wage increase because he was told when he was hired that he would receive a wage increase at the end of his probationary period, in accordance with the Respondent's policy; (3) the allegation that the Respondent engaged in unlawful direct dealing with O'Neil is time barred under Section 10(b); (4) the Respondent was privileged to withdraw recognition of the Union; and (5) the Respondent did not unlawfully refuse to provide the Union with requested information. As set forth below, we find it unnecessary to pass on certain of the exceptions, and we find the others to be meritorious.

[1] We shall substitute a new Order and notice consistent with this decision, and include notice language in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

II. THE FACTS

The Respondent sells and services new and used cars. On December 15, 1997, the Union was certified as the collective-bargaining representative of the Respondent's 16 service and parts employees. In a letter to employees entitled "The Reality of Collective Bargaining," predating the certification, the Respondent stated that there was no telling how long negotiations would last, there was no guarantee that an agreement would ever be reached, or that their wages and benefits would increase, and the Respondent could not unilaterally increase wages or benefits during negotiations. The letter concluded by urging employees to communicate their problems directly to the Respondent and stating that there was no need for a "middle man."

The parties first met for negotiations on January 20, 1998,[2] and met a total of 10 more times between February and November. At the close of the final meeting on November 20, the parties had not reached agreement on a contract. Organizing Director Don Crosatto and Union Representatives Craig Andrews and Ron Parades represented the Union in bargaining, and employee Tim Finnerty served as the Union's employee representative in all but one of the negotiating sessions. Owners Mike Murphy and Bill Martin (Martin died prior to the final meeting) represented the Respondent. The Union did not have a contractual right to enter the Respondent's property, although, on several occasions during negotiations, its representatives held impromptu meetings with employees during lunchbreaks.

The Respondent unilaterally granted wage increases to six employees and promoted five of them during the period of April 1 through January 4, 1999. Although the parties negotiated over wage rates as well as other matters, at no time did the parties agree that the Respondent could make any unilateral changes prior to reaching overall agreement on the contract. The Respondent never informed the Union about any of the promotions or wage increases.

Specifically, on April 1, the Respondent increased Damien Ferrara's wages and promoted him to apprentice detailer. Ferrara previously had been performing "gofer" and shuttle driver duties. In response to Charlie O'Neil's threat to quit, the Respondent's service manager, on July 8, increased O'Neil's wages and promoted him from back counter person to back counter/assistant parts manager. Within a few days, O'Neil told Finnerty about his wage increase. On August 8, the Respondent increased Pedro Ramos' wages and promoted him from detailer to head detailer. On October 20, the Respondent increased

[2] All dates hereafter are in 1998, unless otherwise noted.

Fernando Arcos' wages and promoted him from installer to apprentice technician.[3] On January 4, 1999, the Respondent increased Donny Gouvaia's wages and promoted him from parts driver to apprentice parts counter person.[4] At around the same time, the Respondent increased Jason Espinal's wages.

Although the Respondent called Ferrara, O'Neil, Ramos, Arcos, and Gouvaia as witnesses, none of them testified about their specific job duties either before or after their wage increases and promotions. Murphy testified that he, himself, had not been aware of the wage increases received by Ferrara, Ramos, and Espinal until the Respondent received the Union's unfair labor practice charges, and that lower-level supervisors had made the decisions to grant the increases. Murphy also testified that the Respondent did not have official job titles at any time, and job descriptions had varied depending on "whoever the department manager is, whatever he perceives that person's going to be doing, in a vague, general way, is what he puts on there. And that's based on his background and experience."[5]

After the November bargaining session, the parties suspended bargaining until after the holidays. On about January 12, 1999, Finnerty told Crosatto that he thought that the Respondent was trying to "create sentiment" for decertifying the Union because some employees had gotten substantial wage increases. Prior to this conversation, neither Finnerty nor any other employee had informed Crosatto of any wage increases or promotions. Around the same time, the Union stated in a letter that it was ready to resume bargaining over wages and benefits and requested that the Respondent provide a current list of wage rates for all unit employees. In response, Murphy sent Crosatto a letter and list of wage rates and positions.[6]

On February 4, 1999, the Respondent received a petition signed by 11 of the 16 unit employees stating that they no longer wanted to be represented by the Union. Thereafter, the Respondent informed the Union that it was withdrawing its recognition. A few months later, the Union requested that the Respondent furnish it with information, including a list of current employees and their classifications. The Respondent did not furnish this information to the Union.

III. THE JUDGE'S DECISION

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) by unilaterally granting wage increases to the six unit employees discussed above and promoting five of them to new unit classifications without bargaining with the Union. It also alleged that the Respondent bypassed the Union and engaged in direct dealing with O'Neil about his promotion and wage increase. It further alleged that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union based on an employee petition tainted by the Respondent's unfair labor practices and by refusing to provide information requested by the Union.

The judge found that the Respondent violated the Act by unilaterally creating the classification of apprentice counterparts person, setting its wage rate, and promoting employee Donny Gouvaia to that classification, but he dismissed the remaining complaint allegations.[7] With regard to the unilateral change allegations involving Ferrara, O'Neil, Ramos, and Arcos, and the direct dealing allegation as to O'Neil, the judge found that the charges were time barred, because they were filed more than 6 months after the Union knew or should have known about those changes. In addition, the judge found that the Respondent did not unlawfully increase the wages of Jason Espinal because he was told when he was hired that he would receive a wage increase at the end of his probationary period, in accordance with the Respondent's policy. The judge further found that, because a causal relationship had not been established between the

[3] At Arcos' request, Crosatto had attempted to obtain a wage increase for Arcos in negotiations, but was unsuccessful.

[4] Gouvaia testified that he did not tell any of his coworkers about his raise, he did not know that O'Neil had received a raise, and he never heard O'Neil referred to as the assistant manager. He added that, when managers were not around, the employees did the work "on our own." Arcos testified that he never told his coworkers about his wage increase and did not know until February 1999 that they had received increases. O'Neil testified that he told Finnerty (and no one else) about his wage increase; but, contrary to the judge's finding, the record does not reflect that O'Neil also told Finnerty about his promotion or about "the circumstances surrounding the changes" (O'Neil's discussion of the matters directly with managers).

[5] Murphy testified that Ferrara's "responsibilities would have increased" with his promotion, but did not specify what Ferrara's increased responsibilities were or how they would have been apparent. As to Ramos, Murphy testified that the job duties of head detailer were identical to those of "new car detailer and detail manager," but Murphy did not explain whether and how they differed from the duties of Ramos' former position.

[6] The list Murphy sent Crosatto reflected wages and job titles for Ferrara, O'Neil, and Ramos that were inconsistent with the record testimony set forth in the judge's decision and discussed above. Gouvaia was not on the list.

[7] The judge dismissed additional allegations of unilateral implementation of new unit classifications. It does not appear that the General Counsel or the Charging Party excepted to these dismissals. In any event, because the judge found that the Respondent violated the Act by unilaterally creating the classification of apprentice counterparts person for Gouvaia, which finding we adopt in the absence of exceptions, any further such violations found would be cumulative and would not affect the remedy.

unfair labor practices he found concerning Gouvaia and the employees' disaffection, the Respondent did not violate the Act by withdrawing recognition from the Union and refusing to provide information requested by the Union.

Analysis and Conclusions

For the reasons set forth below, we agree with the General Counsel and the Charging Party that the allegations of unlawful unilateral wage increases (excluding O'Neil's wage increase), promotions, and direct dealing were not time barred and that the Respondent violated the Act as alleged.[8] In addition, we find that the Respondent unlawfully withdrew recognition from the Union. In this regard, the Respondent's unfair labor practices resulted in a sufficient number of tainted signatures on the employee petition so that the Respondent could not properly rely on the petition to support a good-faith doubt of lack of majority support for the Union. Finally, because we have found that the Respondent unlawfully withdrew recognition, we find that the Respondent's refusal to provide the requested relevant information was also unlawful.

A. Unilateral Changes and the Timeliness of the Charge

Section 10(b) states in pertinent part that "[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The 10(b) period begins only when a party has "clear and unequivocal" notice of a violation of the Act. See, e.g., *Desks, Inc.*, 295 NLRB 1, 11 (1989). The burden of showing a complaint is time barred is on the party raising Section 10(b) as an affirmative defense. *Chinese American Planning Council*, 307 NLRB 410 (1992), review denied mem. 990 F.2d 624 (2d Cir. 1993). This burden is met by showing the filing party had actual knowledge or constructive knowledge of the alleged unfair labor practice more than 6 months prior to the filing of the charge. Such knowledge may be imputed where the conduct in question was sufficiently "open and obvious" to provide clear notice. *Duke University*, 315 NLRB 1291 fn. 1 (1995), distinguishing *Southeastern Michigan Gas Co.*, 198 NLRB 1221 fn. 2 (1972), enfd. 485 F.2d 1239 (6th Cir. 1973) (clear notice given because changes made openly). Similarly, knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.[9]

Applying these principles, we cannot agree with the judge that the Union had either actual or constructive knowledge prior to the 10(b) period of the unilateral wage increases and promotions of, respectively, Ferraras', Ramos', and Arcos', and of O'Neil's unilateral promotion.[10] There is no evidence that the Union had actual notice with regard to the changes affecting these four employees, and it is uncontested that the Respondent never informed the Union about any of those changes, although it was bargaining over wages and promotions while it was making the changes.[11]

We also do not impute constructive knowledge to the Union because, contrary to the judge's finding, the Respondent's implementation of these changes, and the circumstances in which they were implemented, did not provide the Union with clear and unequivocal notice. Prior to Finnerty's conversation with Crosatto in January 1999, none of the employees informed the Union about the changes, and there is no evidence that the changes were apparent. With regard to the wage increases, there was no evidence of any open or obvious action, indication, or sign of the changes. As to the promotions, the Respondent presented little or no record evidence describing the duties of the employees either before or after the promotions. Thus, there is no basis for finding that the Union was on notice that the employees' duties had changed. Although the Respondent asserted that the employees' job titles had changed, it presented no evidence that the employees displayed or used their titles with other employees or customers. Moreover, the evidence shows that the Respondent had no fixed system of formal classifications. Given that the Respondent informed employees that it could not unilaterally increase wages or benefits during negotiations, it is no surprise that the employees who received increases and promotions did not

[8] We find it unnecessary to pass on the judge's finding that the Respondent did not unlawfully grant a wage increase to Espinal, because such a finding would be cumulative and would not affect the remedy. Therefore, we do not address Espinal's wage increase in our analysis.

[9] See *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. mem. sub nom. *Gilmore Steel Corp. v. NLRB*, 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990).

[10] We find it unnecessary to pass on the judge's finding that the alleged 8(a)(5) O'Neil wage increase is time barred under Sec. 10(b). Even if it were not, finding that violation would be cumulative and would not affect the remedy. Further, contrary to the judge, O'Neil's statement to Finnerty did not constitute notice to the Union of O'Neil's promotion because O'Neil only informed Finnerty of his wage increase. We note that the Respondent did not prove that Finnerty, whatever his status, knew anything beyond O'Neil's wage increase outside the 10(b) period.

[11] We do not draw an adverse inference against the General Counsel, as the judge did, for failing to call additional witnesses to corroborate Crosatto's uncontested testimony that the Union was unaware of the unilateral changes. The Respondent bears the burden of supporting its affirmative defense.

inform the Union that they personally benefited from changes not offered to others nor agreed to in bargaining. Indeed, the employees who benefited from the changes knew nothing about the wage increases and promotions received by others. Even Murphy, the Respondent's owner, testified that, except for Arcos' wage increase and promotion, he was unaware of the changes until the filing of the Union's charges.

Similarly, we find that the record does not support the judge's finding that the Union failed to exercise due diligence and, had it done so, it would have discovered the unilateral changes within the 6-month period for filing charges. The Union maintained contact with employees and actively represented them in bargaining, which lasted about 10 months; the Respondent withdrew recognition about 2 months later.[12] Further, even accepting that Finnerty was an agent or had a special status as the employee representative in negotiations, as the judge assumed, we do not accept his conclusion that Finnerty's knowledge of O'Neil's wage increase, without more, was sufficient to impose a due diligence requirement on the Union to investigate any other possible wage increase or change in working conditions.

In sum, we conclude that the Respondent failed to establish that the allegations discussed above are time barred by Section 10(b). We, therefore, find that the Respondent violated Section 8(a)(5) and (1) by unilaterally promoting and granting wage increases to Ferrara, Ramos, Arcos, and Gouvaia, and promoting O'Neil, without bargaining with the Union.

B. Direct Dealing

An employer engages in direct dealing, in violation of Section 8(a)(5), if it communicates directly with union-represented employees, and not the designated representative, in the course of establishing or changing wages, hours, and terms and conditions of employment. *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). It is uncontested that the Respondent's service manager communicated directly with O'Neil in promoting him and raising his wages while negotiations were ongoing. The judge dismissed this complaint allegation solely because he found that O'Neil told Finnerty about this discussion more than 6 months before the Union filed its charge. However, contrary to the judge, we do not find that the direct dealing allegation is time barred because there is no record evidence that O'Neil informed Finnerty about his discussions with management that gave rise to his promotion and wage increase. Therefore, we find that the Respondent violated the Act by dealing directly with O'Neil.

C. Withdrawal of Recognition

Contrary to the judge, we find that the Respondent violated Section 8(a)(5) and (1) by withdrawing its recognition of the Union by letter dated February 9, 1999. It is well established that "an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001) (citation omitted). Thus, an employer may not avoid its duty to bargain where its own unfair labor practices caused the union's loss of majority support. See, e.g., *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).

The Board considers the following factors in determining whether the unfair labor practices caused the loss of support: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility for a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Applying these factors, we find a causal relationship between the Respondent's unfair labor practices and the expression of employee dissatisfaction with the Union on which the Respondent based its withdrawal of recognition. With regard to the first factor, the employees' expression of dissatisfaction followed close on the heels of the Respondent's unilateral changes, most of which were implemented in the midst of bargaining for an initial agreement. The parties engaged in bargaining from January to November 1998, and the Respondent unilaterally implemented the wage increases and promotions between April 1998 and January 1999. There is no evidence of employee dissatisfaction with the Union prior to the implementation of the unilateral changes. The Respondent received the petition on February 4, only 1 month after the last unilateral change, and withdrew recognition shortly thereafter. See, e.g., *AT Systems West, Inc.*, 341 NLRB No. 12, slip op. at 5 (2004) (passage of 9 months would not reasonably dissipate the effects of the respondent's conduct).

With regard to the second factor, the Respondent's unilateral changes involved the important, bread-and-butter issues of wage increases and promotions for which

[12] See, e.g., *R. G. Burns Electric*, 326 NLRB 440, 440–441 (1998) (finding the union had exercised reasonable diligence by, among other things, engaging in surveillance of the employer's worksite and questioning sources, notwithstanding its strong suspicion that the employer had acted unlawfully), distinguishing *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992) (union would have discovered evident violations but for its lack of due diligence in failing to visit worksite during working hours).

employees seek and gain union representation. Such changes, particularly where the Union is bargaining for its first contract, can have a lasting effect on employees. As the Board found in *Penn Tank Lines, Inc.*, supra, "[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear." Id. at 1067.

With regard to the third and fourth factors, the Respondent's secretly granting the employees the wage increases and promotions that the Union was seeking but had not obtained in bargaining inescapably caused employee dissatisfaction with the Union as their bargaining representative. Thus, we find that the Respondent's unlawful conduct did lead to a loss of support and that at least 5 of the 11 signatures relied upon by the Respondent in withdrawing recognition were tainted by the Respondent's illegal activity.[13] Even assuming no dissemination of the Respondent's unfair labor practices beyond those 5 employees, less than a majority of the 16 unit employees freely indicated their desire not to be represented by the Union. In short, we find that the nature and timing of the Respondent's unlawful unilateral changes caused the employee dissatisfaction on which the Respondent based its withdrawal of recognition.

D. The Refusal to Provide Information

An employer has the obligation to provide a union, on request, with information relevant to the union's duty as representative of the employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). By letter dated May 29, 1999, the Union requested that the Respondent furnish it with information including, among other things, a list of current employees; rates of pay and job classifications of the employees; a copy of all company fringe benefit plans; and a copy of all disciplinary actions issued in the last year. The Respondent failed and refused to furnish the Union with the requested information. The Respondent does not contest the relevance of the information; rather, it argues that it did not have a duty to provide the information because it lawfully withdrew recognition. We find the requested information relevant to the Union's representational responsibilities[14] and, because we have found that the Respondent unlawfully withdrew recognition, we find that the Respondent's refusal to provide information also violates Section 8(a)(5).

E. Affirmative Bargaining Order

Finally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's refusal to recognize and bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition may exist, moreover, it may be at least in part the product of the Respondent's unfair labor practices.

[13] Although we do not pass on whether the allegation concerning O'Neil's wage increase was time barred, the Respondent's unlawful promotion of and direct dealing with O'Neil, as found above, amply establish that his signature on the petition was tainted.

[14] The information requested by the Union is presumptively relevant because it directly pertains to terms and conditions of employment of the employees represented by the Union. See, e.g., *Crowley Marine Services*, 329 NLRB 1054, 1060 (1999), enfd. 234 F.3d 1295 (D.C. Cir. 2000); and *Equitable Gas Co. v. NLRB*, 637 F.2d 980, 993 (3d Cir. 1981) ("information directly relevant to mandatory subjects of bargaining is 'presumptively relevant,' and must therefore be disclosed unless it is plainly irrelevant").

An affirmative bargaining order is especially warranted because many of the Respondent's unfair labor practices occurred throughout the initial certification year. By this conduct, the Respondent substantially undermined the Union's opportunity effectively to bargain, without unlawful interference, during the period when unions are generally at their greatest strength. Because the Union was never given a truly fair opportunity to reach an accord with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees will be able to assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach an initial collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain steps to effectuate the policies of the Act. We shall also order the Respondent, if requested by the Union, to rescind the unilateral wage increases and promotions granted. Nothing in this Order, however, shall be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

Having found that Respondent unlawfully refused to give the Union relevant information, which it had requested, we shall order that Respondent furnish the Union with the requested information.

Having found that Respondent unlawfully withdrew recognition of the Union, we shall order that the Respondent bargain with the Union in the below described unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, M & M Automotive Group, Inc., d/b/a Broadway Volkswagen, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with East Bay Automotive Council, Consisting of Machinists, Automotive Trades District Lodge 1546, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters Local 78, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time journeymen, apprentice technicians, service advisors, parts people, and detailers, employed by the Respondent at its Oakland, California, facility; excluding all sales persons, office clerical employees, guards, and supervisors as defined in the Act.

(b) Unilaterally granting wage increases and promotions, and implementing new unit classifications without bargaining about these changes with the Union.

(c) Breaching its duty to bargain in good faith by dealing directly with an employee.

(d) Failing and refusing to furnish the Union with information it has requested that is necessary and relevant to the Union in the performance of its duties as the exclusive collective-bargaining agent of the employees in the above appropriate unit.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(b) If the Union requests, cancel the wage increases and rescind the promotions unlawfully granted to unit employees through the Respondent's unilateral action; provided, however, that nothing in this Order shall be construed as requiring the Respondent to rescind the wage increase granted unless the Union requests such action.

(c) Furnish the Union with the relevant information it requested, as set forth in the Union's May 29, 1999 letter to the Respondent.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 24, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with East Bay Automotive Council, Consisting of Machinists, Automotive Trades District Lodge 1546, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters Local 78, International Brotherhood of Teamsters, AFL–CIO as collective-bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time journeymen, apprentice technicians, service advisors, parts people, and detailers, employed by us at our Oakland, California, facility; excluding all sales persons, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally implement wage increases, promotions, and new unit classifications without bargaining with the Union.

[15] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT breach our duty to bargain in good faith by dealing directly with an employee.

WE WILL NOT refuse to provide the Union with requested relevant information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize, and on request, bargain collectively with the Union as the exclusive representative of our employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL on the Union's request, cancel and rescind all or part of the terms and conditions of employment unilaterally implemented on or after April 1, 1998, and retroactively restore preexisting terms and conditions of employment, but nothing in the Board's Order is to be construed as requiring us to cancel any unilateral change that benefited the unit employees without a request from the Union.

WE WILL furnish the Union with the relevant information it requested, as set forth in the Union's May 29, 1999 letter to us.

M & M AUTOMOTIVE GROUP, INC., D/B/A BROADWAY VOLKSWAGEN

Jeffrey L. Henze, Esq., for the General Counsel.
Bethany M. Kaye, Atty. (Littler Mendelson, P.C.), of San Francisco, California, for the Respondent.
Antonio Ruiz and *David A. Rosenfeld, Attys. (VanBourg,Weinberg, Roger and Rosenfeld),* of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS MICHAEL PATTON, Administrative Law Judge. I heard this case at Oakland, California, on November 18, 1999.The charge was filed by East Bay Automotive Council, consisting of Machinists Automotive Trades District Lodge 190, Local Lodge 1546, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters Local 78, International Brotherhood of Teamsters, AFL–CIO (the Union). The original charge was filed by the Union on May 6, 1999, and served on May 7, 1999. An amended charge was filed on June 8, 1999, and served on June 22, 1999.

My findings are based upon the entire record, including the post hearing briefs.[1] In assessing credibility I have considered the inherent probability of the testimony, as well as the demeanor of the witnesses. Much of the evidence consists of stipulations, documents received without objection, and uncontroverted testimony.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits facts establishing that it meets the Board's jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The Respondent is engaged in the sale and service of new and used cars. The facility involved in this case is located in Oakland, California. The Union was certified as the exclusive collective-bargaining representative of approximately 16 service and parts department employees on December 15, 1997, in Case 32–RC–4338. The description of the unit is:

> All full-time and regular part-time journeymen, apprentice technicians, service advisors, parts people, and detailers, employed by Respondent at its Oakland, California, facility; excluding all sales persons, office clerical employees, guards, and supervisors as defined in the Act.

The complaint alleges that following certification of the Union, but prior to any decertification election, the Respondent granted wage increases to six unit employees, unilaterally promoted five of those employees to new unit classifications that were unilaterally implemented and thereafter withdrew recognition of the Union and refused to provide requested information to the Union.

The complaint further alleges that the changes were made without prior notice to the Union and without providing the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, without an overall impasse in negotiations for a collective-bargaining agreement, and as a result of direct dealing with unit employees. The General Counsel asks that the remedy include an extension of the certification.

The Respondent concedes that employees were promoted and given wage increases, but denies that new classifications were implemented and argues that its actions with regard to promotions and wage increases were lawful in the context of past practice and collective bargaining with the Union. Respondent also raises a defense that the allegations regarding four of the six employees are barred by the limitations period in Section 10(b) of the Act. The Respondent further asserts that withdrawal of recognition was privileged because of an employee petition and that the subsequent refusal to furnish information was therefore not unlawful.

[1] The General Counsel and Respondent filed briefs. The Union joined the brief of the General Counsel.

B. The Collective Bargaining

The parties first met for negotiations on January 20, 1998.[2] Additional negotiation meetings were held on February 3 and 24, March 19, April 23, June 11, 12, and 18, July 16, September 4, and November 19. The Union was represented at the bargaining table by Business Representatives Don Crosatto, Craig Andrews, Ron Paredes, and employee Tim Finnerty.[3] Respondent's owners, Bill Martin and Mike Murphy represented the Respondent. At the final meeting Murphy alone represented Respondent. Martin had died prior to the final meeting.

At the negotiation meetings the parties exchanged written proposals and discussed their respective positions on many subjects. The Union made requests for information, including wage information during the course of the bargaining and the Respondent furnished the information in timely fashion. At the close of the November meeting the parties had not reached agreement on a contract.

Crosatto credibly testified that at no time in the course of the bargaining was agreement ever reached that the Respondent could give any employee a pay increase prior to the time that any overall agreement was reached. The negotiations specifically relating to the alleged unilateral changes are addressed in the discussion of the affected individuals.

The parties agreed to suspend negotiations until after the holidays. After the holidays the parties discussed meeting in February 1999. By letter of January 15, 1999, Crosatto stated that the Union was ready to resume negotiations and requested wage information from Murphy. By letter of January 22, 1999,[4] Murphy transmitted the requested information and stated that he would be ready to resume negotiations anytime after February 9, 1999. Murphy testified that at the conclusion of the November 19 meeting the parties had reached tentative agreement on some issues and not on others.

Murphy testified that there were still a lot of things under discussion and that he believed that at the end of the last negotiation session on November 19 that further discussions might lead to an agreement and that the Respondent was still willing to meet. However, on February 9, 1999, Respondent's attorney advised the Union that Respondent was withdrawing recognition. No bargaining has taken place since November 19.

C. The Promotions and Wage Increases

As described in more detail below, the Respondent granted wage increases to six unit employees during the period April 1, 1998, through January 4, 1999. In addition, five of those employees were assigned to different jobs.

[2] Unless otherwise indicated, all dates are 1998.

[3] Employee Gunnar Peterson rather than Finnerty was the employee representative at the at the November 19 meeting. Andrews and Paredes were not at some negotiation meetings.

[4] The letter, GC Exh.. 5, bears the date of "January 22, 1998," an obvious typographical error.

1. Damien Ferrara[5]

On April 1, 1998, the wages of unit employee Damien Ferrara were increased from $6.50 per hour to $8 per hour. It is stipulated that prior to granting this increase the Respondent did not notify the Union, verbally or in writing, that it intended to grant the increase. At that time Ferrara was also promoted from gofer and shuttle driver to apprentice detailer. The parties stipulated that from the date the Union was certified until the date Ferrara was promoted Respondent had no employee with the job description of apprentice detailer. The Respondent did employ at least one detailer, Pedro Ramos, discussed below. At the time Ferrara was promoted Ramos was earning $9.50 per hour.

The Union's bargaining notes consisting of 20 handwritten pages were received in evidence. The notes of the June 18 negotiation meeting contain the notation "Damien $8/hr." Union Agent Crosatto initially testified that the notes were in his handwriting, but later corrected himself, stating that at least a portion of the notes was not his handwriting and that he recognized at least a portion to be in Craig Andrews's handwriting. The question of who prepared which portions of the notes was not resolved. Andrews did not testify. Crosatto's attention was not directed to the quoted notation and he was not specifically asked about the notation

The notes of the June 18 meeting show "MM" and "DC" were among those present on June 18. Crosatto testified that Murphy was present at all negotiating meetings. Murphy credibly testified that he had no knowledge that Ferrara had received the April 1 wage increase until the unfair labor practice charges were filed. Murphy credibly testified that Service Manager Lee Molignoni had approved the promotion of Ferrara.

I conclude that Murphy and Crosatto were both present at the June 18 meeting. The evidence, including the testimony, the stipulations and the negotiation notes, establish that the Respondent did not advise the Union at the June 18 meeting that Ferrara had been given a wage increase on April 1 and that the Union did not at any time agree to Ferrara being given a wage increase or promotion. There was no bargaining regarding creating or filling the job of apprentice detailer.

2. Charlie O'Neil

Unit employee Charlie O'Neil began working for Respondent in 1997. On July 8, 1998, O'Neil's wage rate was increased from $18.32 per hour to $19.32 per hour. The Union had proposed a rate of $20.50 for an assistant parts manager position in bargaining. At the time he was given the wage increase, O'Neil was working as back counter person. O'Neil was called as a witnesses by Respondent and credibly testified that when he was given the increase he was given the title of assistant parts manager. Murphy testified that O'Neil's job after the promotion was back counter person and assistant manager and that he was given additional duties.[6] The parties stipulated that from the date the Union was certified until the date O'Neil was

[5] The complaint was amended at the hearing to correct the spelling of Ferrara's name.

[6] No party contends, and no evidence was introduced, that O'Neil became a statutory supervisor as a result of his promotion. The parts manager and service manager appear to statutory supervisors and agents of the Respondent.

promoted Respondent had no employee with the job description of back counter/assistant parts manager. There was no bargaining regarding creating or filling the job of back counter/assistant parts manager.

Within a few days of receiving this wage increase, O'Neil informed Tim Finnerty of his promotion and a raise, and the circumstances surrounding the changes. The evidence establishes that the Union did not agree to the changes in O'Neil's terms and conditions of employment. It was stipulated that the Respondent did not notify the Union of O'Neil's wage rate increase verbally or in writing.

3. Pedro Ramos

On August 8, 1998, the wages of unit employee Pedro Ramos were increased from $9.50 per hour to $10.50 per hour and he was promoted from detailer to head detailer. The parties stipulated that prior to granting this increase the Respondent did not notify the Union, verbally or in writing, that it intended to grant this increase. Murphy testified that he did not notify the Union that Ramos was given the promotion and wage increase. I credit Crosatto's testimony that the Respondent did not notify the Union of the changes either before they were made. Murphy credibly testified that sales manager George Neri had approved the promotion of Ramos.

Murphy testified that Respondent had a former employee named Richard Costa who worked as head detailer, but he could not recall when. Personnel records establish that Costa was, in fact, made "new car detailer & detail manager" on September 16, 1997. The parties stipulated that Costa was a unit employee earning $2000 per month as of February 3, 1998. The date he ceased to be an employee was not established.

Murphy credibly testified that the job duties of head detailer and new car detailer & detail manager were identical, however, the Union did not at any time agree to Ramos being given a wage increase or promotion and there was no bargaining regarding creating or filling a job with the title of head detailer.

4. Fernando Arcos[7]

On October 20, the wages of unit employee Fernando Arcos were increased from $9.50 per hour to $12.50 per hour and Arcos was promoted from installer to apprentice technician. Both Murphy and Crosatto testified that Arcos was discussed in negotiations. Arcos had approached both the Union and Respondent during negotiations seeking a pay raise. There is no evidence that the Union agreed to the wage increase given to Arcos and there is no evidence that the Union agreed to the specific wage rate that Arcos was given on October 20.

Apprentice technician is a position specifically included in the description of the certified unit, but there is no record evidence that any employee worked in this classification from the date the Union was certified until Arcos was promoted. Murphy credibly testified that the Respondent told the Union that Arcos should either be let go or put in "the apprenticeship program." Crosatto testified that he told Murphy in negotiations that "[y]ou basically got two choices. You can either make him an apprentice mechanic, or you can make him an installer." (Mechanic is a synonym for technician.) Murphy described the Respondent's apprenticeship program for technicians as on the job training and attending Volkswagen classes and other classes. There is no evidence that the Union agreed to the job duties, training or wages to be received by an apprentice technician. I credit Crosatto's testimony that the Respondent did not notify the Union of the changes affecting Arcos, either before they were made.

5. Jason Espinal

Sales Manager George Neri hired unit employee Jason Espinal on September 15, 1998,[8] as an assistant detailer, at a wage rate of $8 per hour. Effective January 1, 1999, Espinal's wage rate was increased to $9 per hour. Neri authorized the increase. The parties stipulated that prior to granting this increase the Respondent did not notify the Union, verbally or in writing, that it intended to grant this increase.

Espinal's personnel record shows that he was advised in writing at the time he was hired that he would receive an increase to $9 per hour after 90 days of satisfactory performance. The Union was not advised of the commitment Respondent had made to give Espinal a wage increase after 90 days and the Union did not at any time agree to it.

I credit Crosatto's testimony that the Respondent did not notify the Union of Espinal's wage increase either before or after it was granted.

6. Donny Gouvaia[9]

On January 4, 1999, the wage rate of unit employee Donny Gouvaia was increased from $10.50 per hour to $14 per hour and he was promoted from parts driver to apprentice parts counter person**.** The parties stipulated in writing that prior to granting this increase the Respondent did not notify the Union, verbally or in writing, that it intended to grant this increase. There were discussions about the possibility of moving Donnie Gouvaia up from parts driver to apprentice parts person, however, the Union did not at any time agree to Gouvaia being given a wage increase or promotion and there was no bargaining regarding creating or filling a job with the title of apprentice parts counter person.

The parties stipulated that from the date the Union was certified until the date Gouvaia was promoted Respondent had no employee with this job description. I credit Crosatto's testimony that the Respondent did not notify the Union of the changes either before they were made. Murphy credibly testified that Parts Manager Bill Scott had approved the promotion of Gouvaia.

D. The Alleged Direct Dealing

In July, O'Neil informed the Respondent's parts manager, Bill Scott, of a job offer he had received from another employer and asked for a wage increase. Scott told O'Neil that there was nothing he could do. O'Neil immediately informed the service manager, Lee Molignoni, that he was quitting. Hoping to keep

[7] The complaint was amended at the hearing to correct the spelling of Arco's name.

[8] His hiring documents incorrectly show his hire date as September 15, 1999. The parties stipulated that the date was September 15, 1998.

[9] The complaint was amended at the hearing to correct the spelling of Gouvaia's name.

O'Neil, Molignoni told O'Neil he would see what he could do and asked O'Neil to give him until that afternoon or the next day. Molignoni thereafter offered O'Neil the job of assistant parts manager and raised his wages to $19.32 per hour, effective July 8. The General Counsel contends that the discussions between O'Neil and Molignoni was unlawful direct dealing. As noted above in the discussion regarding O'Neil's promotion, when O'Neil told Finnerty about his promotion, he told him of the circumstances surrounding the changes. Those circumstances were the discussions with Scott and Molignoni described above.

E. The Withdrawal of Recognition

On February 4, 1999, the Respondent received a handwritten petition signed by 11 of the 16 unit employees. The petition stated, "The undersigned employees of Broadway VW no longer want to be represented by Machinists local 1546/Local 78." The signers included employees Ferrara, O'Neil, Arcos, Espinal, and Gouvaia.

On February 9, 1999, the Respondent's attorney sent a letter by mail and FAX to Crosatto withdrawing recognition of the Union. The text of the letter was as follows:

> I am writing you at the request of Broadway Volkswagen. The purpose of this letter is to inform you that Broadway Volkswagen has received objective evidence that a majority of the employees in the collective bargaining unit represented by Machinists Local 1546 no longer wish to be represented by the Union. Based on this objective evidence, Broadway Volkswagen doubts in good faith that the Union represents the unit employees.
>
> Accordingly, by this letter, I have been authorized by Broadway Volkswagen to withdraw recognition of Machinists 1546 as the representative of the dealership's employees. The dealership will not bargain further with the union.

F. The Refusal to Furnish Information

By letter dated May 29, 1999, the Union requested that Respondent furnish it with the following information:

> 1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number and date of completion of any probationary period, and any wage increases received during the period January 1, 1999 to present.
>
> 2. A copy of all current company personnel policies, practices or procedures;
>
> 3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above;
>
> 4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees;
>
> 5. Copies of all current job descriptions;
>
> 6. Copies of any company wage or salary plans;
>
> 7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year.
>
> 8. A statement and description of all wage and salary plans which are not provided under number 6 above.

The Respondent has not furnished the requested information.

Analysis and Conclusions

A. Contract Negotiations

The complaint does not allege that the conduct of Respondent during negotiations demonstrated bad faith. The General Counsel does urge a finding that there was never an impasse in bargaining. At the hearing Respondent's attorney stated that it was the Respondent's position that the Union walked away from the table for several months and reserved the right to address the issue of impasse in the posthearing brief, however, Respondent's posthearing brief does not urge a finding of impasse.

Impasse is a breakdown in collective-bargaining negotiations when neither side will make further concessions. It is a situation in which one party is warranted in assuming that the other party has abandoned any desire for continued negotiations, or that further good-faith bargaining would be futile. While the negotiations apparently proceeded at a leisurely pace, the good-faith obligation to initiate meetings and to meet was mutual on both parties. Moreover, the parties were engaged in their first experience in bargaining after certification and their efforts to achieve a contract should be accorded the fullest opportunity. *Alsey Refractories Co.*, 215 NLRB 785 (1974).

As described in part II,B above, at the conclusion of the November 19 meeting the parties had reached tentative agreement on some issues. Other items were still under discussion at the conclusion of the November 19 meeting, but Murphy testified that it was his opinion that further discussions might lead to an agreement and that the Respondent was still willing to meet. Respondent demonstrated a continued willingness to meet by Murphy's January letter of January 22, 1999, where he stated that he would be ready to resume negations anytime after February 9. The evidence establishes that there was no impasse in the negations.

B. The 10(b) Defense—Employees Arcos, Ramos, O'Neil, and Ferrara

The Respondent urges dismissal of the allegations relating to Arcos, Ramos, O'Neil, and Ferrara as being time barred under Section 10(b) of the Act. The earliest charge was filed and served more than 6 months after the changes affecting those employees were made.

The Respondent maintains that the evidence shows that the Union had knowledge of O'Neil's increase in early July when O'Neil spoke to Finnerty. The Respondent reasons that if the Union did not have actual knowledge of the changes affecting Arcos, Ramos, and Ferrara, it was willfully ignorant, arguing that the Respondent did not actively hide the changes, complied with the Union's information requests and did not prevent employees from speaking with union representatives. In support of its position Respondent cites *Moller Bros. Body Shop*, 306 NLRB 191 (1992).

The General Counsel argues that the evidence does not establish that the Union had actual or constructive knowledge of

the changes, citing *John Morrell & Co.*, 304 NLRB 896 (1991). The General Counsel points to the stipulation that the Respondent did not notify the Union of the alleged unilateral changes and the testimony of Crosatto that he did not learn of the changes before January 1999.

The General Counsel acknowledges that under *R. G. Burns Electric*, 326 NLRB 440 (1998), and *Duke University*, 315 NLRB 1291(1995), even in the absence of actual knowledge, a union may be charged with knowledge if the charging party knew or should have known of the unfair labor practice and could have discovered it in the exercise of due diligence. As noted by the General Counsel, where a charging party is on notice of facts sufficient to create a suspicion that a statutory violation has occurred, due diligence requires further investigation to determine whether the conduct was unlawful. *Garrett Railroad Car & Equipment, Inc*., 289 NLRB 158 (1988).

The General Counsel argues that the facts in the present case distinguishes it from *R. G. Burns*, supra, *Duke University*, supra, and *Moller Bros.*, supra, arguing that the evidence does not establish actual knowledge or facts that would cause the Union to have constructive knowledge.

It is well established that a defense under Section 10(b) is an affirmative defense. The 10(b) period does not begin running until the charging party has either actual or constructive knowledge of the existence of facts that would establish the violation. It is settled that a respondent asserting a 10(b) defense bears the burden of establishing that the charging party had such knowledge more than 6 months before filing the charge. *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). I conclude that the evidence establishes that Section 10(b) bars the allegations relating to Arcos, Ramos, O'Neil, and Ferrara.

The 10(b) period can begin to run when an employer openly implements change in employees' wages and fringe benefits. The Board has found open and actual changes in working conditions to constitute clear notice to all as of the dates the changes are made. *Southeastern Michigan Gas Co.*, 198 NLRB 1221 fn. 2 (1972). The facts of the present case establish that the changes affecting Arcos, Ramos, O'Neil, and Ferrara were open and obvious and effectively gave notice to the Union more than 6 months before a charge was filed. The changes affecting all four employees included reassignment to what the complaint alleges and the General Counsel argues were new job classifications with different job duties. In the case of Ferrara and Arcos, the new jobs appear to be markedly different. The changes were particularly obvious because they affected 25 percent of a 16-person unit at a single location.

Within a few days of receiving his wage increase, O'Neil informed Tim Finnerty of his promotion and the circumstances surrounding the changes. O'Neil's report to Finnerty is additional evidence that 10(b) bars the allegations of changes affecting Arcos, Ramos, O'Neil, and Ferrara. O'Neil was promoted on July 8. Within a few days of his promotion O'Neil had told Finnerty of his promotion, as well as the circumstances. Crosatto testified that Finnerty was a member of the Union's bargaining committee. Crosatto admitted that he spoke with Finnerty before and after the negotiating sessions and spoke with him regularly by phone.

Finnerty appears to have been an agent of the Union, at least for the purpose of communication between the unit employees and the Union. This is one of the functions customarily associated with the role of employee members of a union's negotiation committee. O'Neil statement to Finnerty was, therefore, notice to the Union in July of O'Neil's promotion, as well as notice of the alleged direct dealing with him. Moreover, the receipt of this information should have alerted Finnerty and the Union to Ferrara's earlier promotion as well as the subsequent promotions of Ramos and Arcos, all of which were openly made.

The Board's decision in *California Portland Cement Co.*, 330 NLRB 144 (1999), does not require a different result. In that case it was concluded that a nominal steward who was working behind the union's picket line and who was considered a supervisor by the respondent employer was not the agent of the union to receive notice of unilateral changes. The facts in *California Portland Cement Co.*, supra, contrast sharply with those in the present case.

Even if Finnerty is not viewed as an agent, his special status as a representative of the employees in negotiations and his strong support of the Union implicit in his participation in negotiations is, absent any rebuttal evidence, sufficient to warrant an inference that Finnerty did inform the Union of O'Neil's promotion and of the alleged direct dealing. This inference is supported by the testimony of Crosatto that he stressed in organizing meetings that any increases before a full contract was achieved would first have to be approved by the Union.

Based on the foregoing, I conclude that the Respondent has made a prima facie showing that the Union had knowledge of the changes affecting Arcos, Ramos, O'Neil, and Ferrara sufficient to cause the 10(b) limitations period to begin running over 6 months prior to the filing of the initial charge. The General Counsel has not rebutted the Respondent's prima facie showing.

Finnerty was not called as a witness regarding either his duties as a member of the negotiation committee or what he reported to the Union regarding his conversations with O'Neil and what he must have observed of the changed job duties of Arcos, Ramos, O'Neil, and Ferrara. It can be reasonably assumed that as a witness Finnerty would have been favorably disposed to the Union. In this regard, there is no evidence that Finnerty received any special treatment that would tend to cause him to testify untruthfully in support of the Respondent and he was not one of the employees who signed the antiunion petition. Under these circumstances, I draw an adverse inference from the General Counsel's failure to call Finnerty. See *Electrical Workers Local 3 (Teknion, Inc.),* 329 NLRB 337 (1999). Employing the same rationale, I conclude that Andrews and Paredes, the other union officials who participated in the negotiations, would be favorably disposed to the Union. I draw an adverse inference form the General Counsel's failure to call them. Thus, I conclude that had Finnerty, Andrews and Paredes been called, they would have supported the Respondent's position on the 10(b) issue.

Finally, I find that Crosatto had constructive knowledge of O'Neil's promotion more than six months before a charge was filed. The concept of constructive knowledge incorporates the

notion of "due diligence." Notice for the purpose of the 10(b)-limitation period may be found even in the absence of actual knowledge if a charging party has failed to exercise reasonable diligence. That is, the 10(b) period commences running when the charging party either knows of the unfair labor practice or would have discovered it in the exercise of reasonable diligence. *Leach Corp*, supra; *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). Crosatto testified that on several occasions during negotiations the Union had impromptu meetings with employees in the shop during the lunchbreak, in addition to his regular discussions with Finnerty. The unit was small and all the unit employees worked at the same location. Thus, a reasonably diligent union agent would have learned what occurred. Crosatto testified that no employee told him of the promotions. If true, this testimony demonstrates a lack of diligence in keeping informed regarding the unit. Moreover, the Respondent promptly responded to the Union's requests for information. The Union could have informed itself of the personnel actions at issue. These facts establish that the Union had constructive knowledge of O'Neil's promotion.

In view of all the foregoing, I conclude that the complaint should be dismissed with regard to the promotions, wage increases and new positions affecting to Arcos, Ramos, O'Neil, and Ferrara.

The General Counsel contends that the discussions between O'Neil and Molignoni that preceded O'Neil's promotion were unlawful direct dealing. In view of the credible evidence that O'Neil related these discussions to Finnerty, I conclude that the complaint allegations of direct dealing should also be dismissed under Section 10(b) of the Act.

C. The Promotion of Gouvaia

On January 4, 1999, the wage rate of unit employee Donny Gouvaia was increased from $10.50 per hour to $14 per hour and he was promoted from parts driver to apprentice parts counter person. The uncontroverted evidence, the credited testimony of Crosatto and the stipulations show that the job of apprentice parts person was newly created at the time of Gouvaia's promotion without the agreement of the Union and that the wage rate for apprentice parts person was set without agreement by the Union. Further, Respondent did not notify the Union of the new position, the wage rate or Gouvaia's promotion either before or after they were made.

In his brief, the General Counsel argues that Section 8(a)(5) makes it an unfair labor practice for an employer to make changes in mandatory subjects of bargaining without first providing the certified union with prior notice and an opportunity to bargain and that wages, promotions, and job classifications/duties fall within the scope of this mandate. The General Counsel cites *Outboard Marine Corp.*, 307 NLRB 1333 (1992); *Quik Park Garage Corp.*, 315 NLRB 111 (1994); *Venture Packaging*, 294 NLRB 544 (1989).

The Respondent apparently contends that it was privileged to promote Gouvaia to a new position unilaterally because the wage rate he was paid after the promotion was less than had been offered in negotiations for the classification of parts technician, that the departure of counter person Tom Nickels and an increase in business had created an opening, that the promotion was consistent with past practice and that the decision was a lawful management decision. No supporting case authority was cited.

The Board's standards for assessing whether the Respondent violated its bargaining obligation regarding the changes affecting Gouvaia are found in *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), as modified and explicated in *RBE Electronics of S.D., Inc.* 320 NLRB 80 (1995). In *RBE Electronics*, the Board stated:[10]

> The Board held in *Bottom Line Enterprises*, supra, that when . . . parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board in *Bottom Line* recognized two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and "when economic exigencies compel prompt action."
>
> . . . .
>
> Of course, there are certain compelling economic considerations that the Board has long recognized as excusing bargaining entirely about certain matters. The Board has limited its definition of these considerations to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.
>
> . . . .
>
> In cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a heavy burden, and as involving the existence of circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action.
>
> . . . .
>
> [T]here are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the Bottom Line exception. . . .Where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, . . . the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.
>
> . . . .
>
> [A]n analysis accommodating these interests of both the union and employer is not easily susceptible to bright line rules. In defining the type of economic exigency sus-

[10] Citations omitted.

> ceptible to bargaining, however, we start from the premise, derived from the cases discussed above, that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable.

Utilizing the analytical framework described in *RBE Electronics*, supra, it is clear that the unilateral wage increase, promotion and creation of the new position of apprentice parts counter person violated Section 8(a)(5). The Union did not agree to the wage increase. Since there was no impasse in bargaining, the Respondent was not privileged act unilaterally because it has not brought itself within the limited exceptions described in *RBE Electronics.*

Negotiations proceeded at a somewhat leisurely pace, however, there is an absence of evidence that the Union engaged in tactics designed to delay bargaining. Thus, there is no evidence that the Respondent requested negotiation meetings at shorter intervals, that the Union inappropriately canceled meetings or that the Union otherwise attempted to delay bargaining. Accordingly, the Respondent cannot rely on improper conduct by the Union in negotiations to privilege unilateral changes.

The Respondent apparently argues that economic exigencies occasioned by increased business and the departure of another employee compelled unilateral changes. To justify unilateral action under the economic exigency exception is a heavy burden. Here there is no substantial and credible evidence to support such a contention. A mere claim of economic exigency does not satisfy the requirements to establish the sort of business emergency required under *Bottom Line Enterprises*, supra.

The evidence does not establish that the promotion of Gouvaia and the creation of an apprentice parts counter position was an economic emergency. However, even if it is assumed that the Respondent was confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, the Respondent did not provide the Union with notice or any opportunity to bargain and accordingly did not satisfy its statutory obligation.

The contention of Respondent that the wage increase to Gouvaia was privileged because it was less was less than had been offered in negotiations for a classification of parts technician has no merit under well settled law and is not supported by legal analysis urging a change in the law. The record does not establish that parts technician is identical to the newly created apprentice parts counter person. This contention is rejected. The claim that the promotion was privileged as consistent with past practice is also contrary to well settled law and is not supported by legal analysis urging a change in the law. These asserted defenses are groundless and are rejected. The creation of the apprentice parts counter position, the setting of the wage rate for the position and the promotion of Gouvaia violated Section 8(a)(1) and (5) of the Act. See *Stephenson Haus*, 279 NLRB 998 (1986); *Frank Leta Honda*, 321 NLRB 482 (1996).

D. The Wage Increase Granted to Espinal

The facts regarding the wage increase given to unit employee Jason Espinal after he completed 90 days of employment are not disputed. At the time he was hired on September 15, 1998, he was informed in writing that he would receive an increase to $9 per hour after 90 days of satisfactory performance. Espinal signed the document. This promised increase was granted without notice to or bargaining with the Union. Murphy credibly testified that it was the practice of the Respondent to provide for a raise for new employees at the completion of their probationary period. Personnel records illustrating this practice were received into evidence. The Union was not aware of the practice. There is no evidence that Respondent did not fully and promptly comply with information requests. I conclude that relevant information regarding such increases and the terms established at the time Espinal was hired were available to the Union. The Union did not request the information.

The General Counsel points to the lack of notice to the Union and apparently contends that the Respondent committed a per se violation. The General Counsel does not acknowledge that the terms established when Espinal was hired have any significance in resolving the issue of the legality of the wage increase.

The Respondent contends that it was privileged to grant the raise to Espinal because of the hiring agreement, and contends that the increase was consistent with past practice.

The Supreme Court has distinguished between automatic wage increases to which the employer has already committed itself and wage increases that are "in no sense automatic, but [are] informed by a large measure of discretion." *NLRB v. Katz,* 369 U.S. 736, 346. (1962). An employer is required to grant an automatic wage increase unless it notified the union that it wished to make a change in the existing conditions of employment and gave the union an opportunity to bargain over the change. See *City Cab Co. of Orlando,* 273 NLRB 1344 (1985).

It is clear that the increase given to Espinal was the sort of increase Respondent was required to give by the express written terms of the documents prepared at the time he was hired.

The complaint does not allege and the General Counsel does not contend that the terms set at the time Espinal was hired were unlawful. I specifically find that the issue was not litigated. The only way in which the General Counsel could establish that the increase was unlawful would be to prove that the original terms set when Espinal was hired were set without complying with statutory bargaining requirements and therefore, arguably, void. That approach would require a finding of unlawful conduct which can be charged to be an unfair labor practice only through reliance on an earlier time-barred unfair labor practice, which would be inconsistent with the holding in *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1959). See *Consolidation Coal Co.,* 277 NLRB 545 (1985).

In view of the foregoing, I conclude that the complaint allegations of unilateral changes in the granting of a wage increase to Espinal should be dismissed.

E. Direct Dealing

The complaint generally alleges that the Respondent implemented wage increases, promotions, and new classifications as a result of direct dealing with unit employees without specifying which of the alleged changes were the results of direct dealing. The post hearing brief of the General Counsel identifies only O'Neil as having been an employee who was the object of direct dealing. There is no evidence of direct dealing regarding O'Neil within the 10(b) period, as discussed above. Accordingly, I conclude that the complaint allegations of direct dealing should be dismissed.

F. The Withdrawal of Recognition

Absent exceptional circumstances not involved here, a union enjoys a conclusive presumption of majority status during the year following certification. *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). After expiration of the certification year, an employer may withdraw recognition on the basis of evidence that the Union in fact no longer has majority support or on the basis of a good-faith doubt of majority support based on objective considerations. Such withdrawal may occur only in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Absent a general refusal to recognize and bargain with the union, in which case a causal relationship is presumed, a causal relationship must be established between the unfair labor practice and employees' disaffection. *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996); *Rose Hills Mortuary,* 324 NLRB 406 (1997); *Quazite Corp*., 323 NLRB 511 (1997).

The General Counsel contends that Respondent undermined the ongoing negotiations for an initial agreement covering, inter alia, wage rates, job duties, and promotional policies, depriving the Union of the opportunity to represent the unit employees, necessarily delayed the ongoing bargaining, precluded the parties from being able to bargain in good faith to agreement on wage rates, and sent the unmistakable message that any benefits to be obtained from this bargaining would be a long time in coming. The General counsel argues that Respondent's unfair labor practices, as a matter of law, foreseeable resulted in the loss of employee support for the Union, and fatally tainted the subsequent employee petition.

The Respondent, in addition to contending that the evidence did not establish unfair labor practices prior to the withdrawal of recognition, contends that Respondent was willing to bargain in good faith with the Union over wages, hours, and working conditions and that the changes do not negate good faith bargaining. The Respondent argues that the employees' petition can only be invalidated if there is a nexus between the alleged unfair labor practices and the employee petition. Respondent contends that the General Counsel has presented no evidence of a causal connection, let alone any specific proof.

The unilateral promotion of Gouvaia involved three aspects of terms and conditions of employment. These were the job title, the wage rate and the selection. However, these three issues were intertwined and were part of a single transaction. There is little specific record evidence on the issue of causal connection. Gouvaia credibly testified that he told no one of his wage increase prior the withdrawal of recognition. Presumably other employees noticed that his duties had changed when he began working at the parts counter. There is no evidence that his duties at the parts counter were different than other parts counter employees and there is no evidence that his being classified as apprentice was known to any of the other unit employees. . There is no evidence that any other unit employee was aware that the Respondent had acted unilaterally in promoting Gouvaia. There is no evidence that Gouvaia's was active in the effort to oust the Union, other than signing the petition.

Under the facts of this case, the evidence does not establish a causal relationship between the unfair labor practice and the disaffection of any employee other than Gouvaia. Thus, even without considering Gouvaia, 10 of 16 unit employees expressed their wish to no longer be represented by the Union. Applying the standards articulated by the Board in *Quazite Corp*., supra, I conclude that the Respondent was privileged to withdraw recognition.

The General Counsel contends in the alternative that Board should overrule *Celanese Corp. of America*, 95 NLRB 664 (1951), and hold that no employer may lawfully withdraw recognition from a certified bargaining representative unless, at the time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a secret ballot election conducted at an appropriate time. Under this proposal, a Board-conducted secret-ballot election would become the only means by which the presumption of the Union's continued majority status after the expiration of the certification year could be rebutted. Since no such secret ballot election was held here, the General Counsel argues that Respondent's refusal to recognize and bargain with the Union after February 9, 1999, violated Section 8(a)(5) of the Act. I decline to reach the merits of the arguments advanced by the General Counsel regarding this issue. It is my duty to decide the case consistent with Board precedent.

In view of the foregoing, I conclude that the complaint allegation that the Respondent violated the Act by withdrawing recognition of the Union should be dismissed.

G. The Refusal to Provide Information

By letter dated May 29, 1999, the Union requested that Respondent furnish it with the certain information. Because the Respondent had lawfully withdrawn recognition on February 9, 1999, it had no duty to respond to the request. Accordingly I conclude that the complaint allegations of a refusal to furnish information should be dismissed

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit for collective bargaining is:

> All full-time and regular part-time journeymen, apprentice technicians, service advisors, parts people, and detailers, employed by Respondent at its Oakland, California, facility; excluding all sales persons, office clerical employees, guards, and supervisors as defined in the Act constitute a unit appro-

priate for collective bargaining within the meaning of Section 9(b) of the Act.

4. By unilaterally instituting the classification of apprentice parts counter person; by unilaterally promoting an employee to the position of apprentice parts counter person and by unilaterally setting the wage rate of the employee promoted to apprentice parts counter person Respondent violated Section 8(a)(5) and (1) of the Act.

5. The Respondent has not violated the Act except as herein specified.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In fashioning the remedy I have been guided by the remedy ordered in *Quazite Corp.*, supra.

ORDER

The Respondent, M & M Automotive Group, Inc., d/b/a Broadway Volkswagen, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally instituting the classification of apprentice parts counter person, unilaterally promoting an employee to the position of apprentice parts counter person and unilaterally setting the wage rate of the employee promoted to apprentice parts counter person.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Oakland, California facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated April 18, 2000.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize,
> To form, join, or assist any union,
> To bargain collectively through representatives of their own choice,
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally institute the classification of apprentice parts counter person, unilaterally promote an employee to the position of apprentice parts counter person or unilaterally set the wage rate of an employee promoted to apprentice parts counter person.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

M & M AUTOMOTIVE GROUP, INC., D/B/A BROADWAY VOLKSWAGEN

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."